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No.

IN THE

Supreme Court of the United States

SHIRLEY METZ,

Petitioner,

vs

TOOTSIE ROLL INDUSTRIES, INC., and LOCAL UNION NO. 1, BAKERY, CONFECTIONARY AND TOBACCO WORKERS' INTERNATIONAL UNION OF AMERICA

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner, Shirley Metz, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 16, 1983.

QUESTIONS PRESENTED FOR REVIEW

(1) What conduct on the part of a union triggers the six-month limitations period within which an employee must bring suit for breach of the union's duty of fair representation.

(2) At what point in time should an employee become aware that union inaction on her grievance constitutes a breach of the union's duty of fair representation.

(3) Does a union's inaction in processing a grievance amount to a continuing violation of the union's duty of fair representation.

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OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 715 F. 2d 299 (7th Cir. 1983). It also appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 16, 1983. No petition for rehearing was filed. This petition for certiorari was filed within 90 days of the date of the entry of the Court of Appeal's opinion. The Court's jurisdiction is invoked under 28 U. S. C. 1254(1).

STATEMENT OF THE CASE

Plaintiff filed her complaint against Tootsie Roll Industries, Inc., her former employer, and Local No. 1 of the Bakery, Confectionary and Tobacco Workers, her union, on June 23, 1982. She filed a two count complaint alleging in Count I that under Section 301 of the Labor Management Relations Act, 29 U. S. C. Section 185, she was terminated by her employer in violation of the collective bargaining agreement then in effect and that her union violated its statutory duty of fair representation. Count II of the complaint alleged that her discharge was in retaliation for seeking enforcement of certain statutory rights under the Illinois Workers Compensation Act, Ill. Rev. Stat., 1981, ch. 48, Section 138.1 *et seq.*

Upon her discharge, the plaintiff notified the respondent union that she believed her discharge was in violation of her contractual and statutory rights and requested that these rights be enforced under the collectively bargained grievance procedure. On May 5, 1981, the union notified the respondent company that plaintiff's rights were violated under the applicable collective bargaining agreement and demanded that plaintiff be reinstated. Plaintiff alleges that no further action has been taken by the respondent union on her behalf since that date, even though the union continued to acknowledge that the employer violated the terms and conditions of the collective bargaining agreement and even though the collective bargaining agreement expressly provided that all cases of discharge shall be subject to the grievance procedure. The complaint went on to allege in Count I that the defendant union has failed to initiate and process the grievance or take any other affirmative action on her behalf. Petitioner also alleged that the defendant union gave no reason for its inaction, nor did it ever notify her that it would not proceed with the processing of her grievance. On June 7, 1982, the union's attorneys wrote

petitioner's counsel regarding the prospects of resolving Metz's grievance.[1] Petitioner filed suit a short time later.

Count II of the petitioner's complaint alleged a statutory cause of action under Illinois law. The jurisdictional allegations of Count I were incorporated by reference and in addition, the complaint alleged that jurisdiction was pendent to Count I. The complaint further alleged in Count II that petitioner was discharged on January 15, 1981, in retaliation for exercising her rights under the Workers Compensation Act. Ill. Rev. Stat., 1981, ch. 48, Section 138.1 *et seq.* Ms. Metz went on to allege that she was discharged while still under doctor's care and temporarily totally disabled and said discharge was not for just cause as required in the collective bargaining agreement, but in retaliation for the exercise of her statutory rights under the Workers Compensation Act.

The respondents both filed motions to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that the federal law claims were barred by the applicable statute of limitations. The respondents sought dismissal of the state claim for lack of pendent jurisdiction, given the motion to dismiss in the federal action. The district court granted the motions to dismiss. Petitioner filed a motion to reconsider and clarify the dismissal order which was denied.

An appeal was then taken to the Seventh Circuit Court of Appeals. On appeal, the petitioner argued that her complaint was timely filed because no final decision concerning her grievance had been made by either the union or the employer, nor had any decision regarding this grievance ever been communicated to her. Additionally, Metz contended that the

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[1] This letter was not a part of the original record. Petitioner moved to supplement the record to include this document. This motion was granted. 715 F. 2d 299, 300. A copy of this letter is enclosed in the Appendix.

union's inaction concerning the processing of her grievance constituted a continuing violation of its duty of fair representation.

On August 16, 1983, the Seventh Circuit affirmed the district court's dismissal. Relying upon the decision in *DelCostello* vs *International Brotherhood of Teamsters*, ____ U. S. ____, 113 LRRM 2737 (1983), the court held that the statute of limitations to be applied in this case is the six month limitations period provided by Section 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b). The court went on to hold that the petitioner should have realized the union was taking no action on her behalf and actual notification by the union to petitioner as to refusal to process her claim was not necessary. Additionally, the court found that inactivity regarding petitioner's grievance did not amount to a continuing violation of its duty of fair representation. Petitioner's § 301/fair representation suit was thus held to be time-barred.

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I.

THE LIMITATIONS PERIOD IN AN ACTION FOR BREACH OF THE DUTY OF FAIR REPRESENTATION SHOULD BEGIN TO RUN WHEN THE EMPLOYEE ACTUALLY BECOMES AWARE OF THE UNIONS BREACH

An employee seeking any remedy against his employer for an alleged breach of a collective bargaining agreement is ordinarily required to attempt to exhaust any grievance or arbitration procedures found in the bargaining agreement prior to filing suit. *Republic Steel Corp.* vs *Maddox,* 379 U.S. 650, 652-653 (1965), *Clayton* vs *Automobile Workers,* 451 U.S. 679 (1981). However, if it is alleged that the union representing the employee in the grievance/arbitration procedure, breaches its duty of fair representation, an employee may bring suit against both the employer and the union, notwithstanding the outcome of the grievance procedure. *Vaca* vs *Sipes,* 386 U.S. 171 (1967), *Hines* vs *Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976), *United Parcel Service, Inc.* vs *Mitchell,* 451 U.S. 56 (1981).

Until recently, the appropriate limitations period to be applied in § 301/fair representation cases has been the subject of differing views. However, in *DelCostello* vs *International Brotherhood of Teamsters,* ____ U.S. ____, 113 LRRM 2737 (1983), this Court concluded that § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) should be applied in such cases. As a result, an employee bringing a hybrid § 301/fair representation suit has six months within which to bring his action. The question becomes when does this six month time period begin to run in fair representation cases.

Petitioner does not dispute the fact that a basic federal concept underlying Section 301 substantive law requires deference to the voluntary contractual grievance procedures for

the settlement of labor management disputes in a quick and timely manner. See, e.g., *United Steelworkers* vs *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 4 L.Ed.2d 1424, 80 S.Ct. 1358 (1960), *United Steelworkers* vs *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 4 L.Ed.2d 1409, 80 S.Ct. 1347, (1960), *United Steelworkers* vs *American Manufacturing Co.*, 363 U.S. 564, 4 L.Ed.2d 1403, 80 S.Ct. 1363 (1960). However, it must be remembered in such cases that the dispute resolution process is tripartite in nature, with the union, employer and the employee all having a significant stake in the outcome. Just as the union and employer are entitled to an expeditious and final resolution of labor-management disputes, so is the employee. This Court characterized the employees status with regard to the grievance procedure in the following manner:

> In the labor setting, by contract, the employee will often be unsophisticated in collective bargaining matters, and he will almost always be represented solely by the union. He is called upon, within the limitations period, to evaluate the adequacy of the union's representation, to retain counsel, to investigate substantial matters that were not at issue in the arbitration proceeding, and to frame his suit. *DelCostello, supra,* 113 LRRM at 2742.

In both of the major cases to date dealing with the limitations issue, *DelCostello* and *Mitchell, supra,* as well as those from the Seventh Circuit, *Davidson* vs *Roadway Express, Inc.*, 650 F.2d 902 (7th Cir. 1981); *Hall* vs *Printing and Graphic Arts Union Local No. 3*, 696 F.2d 494 (7th Cir. 1982); and *Stevens* vs *Gateway Transportation Company*, 696 F.2d 500 (7th Cir. 1982), the employee had actual knowledge of the decision that was made with regard to his grievance. In the present case, it is undisputed that the respondent union never communicated to the petitioner that it would not proceed any further on her behalf. Moreover, the union initially indicated to the petitioner that her grievance had merit. Taken on its face, the complaint indicates that the petitioner never was informed of the status of her grievance. Given the liberal rules of pleading, especially in fair representation cases, and the fact

that all well-pleaded facts are taken as true on a motion to dismiss under Rule 12(b), the complaint states a timely cause of action. See *Conley* vs *Gibson*, 355 U.S. 41 (1975).

The Seventh Circuit has held in this case that failure to file a grievance has the same finality effect of a final decision in a grievance or arbitration proceeding. 715 F. 2d at 303. While that may or may not be the case, the union's failure or refusal to process should at least be required to be communicated to the employee. Anything less puts the employee in the position of being a mind reader as to the union's unexpressed intentions. The respondent union admits that it sent a letter to the employer regarding the merits of plaintiff's reinstatement. There is nothing in the record to indicate that its position has ever changed. Yet somehow, it is held that the petitioner is supposed to know that the union really wasn't going to take any action on her behalf and a lawsuit would be necessary.

To hold that absent some reasonable indication from the union an employee is presumed to know that a breach of the duty of fair representation has taken place, unjustly imposes a greater burden upon the aggrieved employee in such cases. As noted by the Court in *DelCostello, supra:*

> The union's breach of duty may consist of a wrongful failure to pursue a grievance to arbitration, as in *Vaca* and *Bowen*, or a refusal to pursue it through even preliminary stages. The parallel to vacation of an arbitral award seems tenuous at best in these situations; it is doubtful that many state arbitration statutes would themselves cover such a case in a commercial setting. Yet if it were thought necessary to apply different state rules to these different possibilities, the result would be radical variation in the treatment of cases that are not significantly different with regard to the principles of *Vaca, Hines,* and *Mitchell.* Moreover, the difficulty of detecting and mustering evidence to show the union's breach of duty may be even greater in these situations, and it may not be an easy task to ascertain when the cause of action accrues. 113 LRRM at 2742 f.n. 16.

Cases involving unfair labor practice charges under Section 10(b) of the NLRA (the appropriate limitations period to be applied), lend credence to petitioner's argument. The courts have held that under § 10(b) the limitations period does not begin to run until the alleged unlawful activity has become known to the charging party. *NLRB* vs *Duncan Foundry & Machine Works, Inc.*, 435 F. 2d 612 (7th Cir. 1970), *NLRB* vs *Allied Products Corp.*, 548 F. 2d 644 (6th Cir. 1977), *NLRB* vs *Shawnee Industries, Inc.*, 333 F. 2d 221 (10th Cir. 1964). Since no final determination has been made with regard to this grievance, the six-month limitations period has not yet commenced.

II.

IT WAS REASONABLE FOR THE PETITIONER TO BELIEVE THAT THE UNION WAS ACTING ON THE PETITIONER'S BEHALF

The Court of Appeals in this case applied the general rule that the limitations period begins to run when the claimant discovers, or in the exercise of reasonable diligence should have discovered the alleged violation. *Hungerford* vs *United States*, 307 F. 2d 99, 102 (9th Cir. 1962). The court went on to hold that under *Hungerford*, the petitioner should have discovered the acts giving rise to the alleged breach at some point in time prior to six months before suit was filed. According to the holding, the petitioner should have known that under the provisions of the contract the time to elect arbitration had arrived in late February or early March, 1981. Yet it is undisputed that in May 1981, the respondent union, in a letter to Tootsie Roll, stated the union's position that Tootsie Roll's action violated the plaintiff's rights under the terms of the collective bargaining agreement. The court's interpretation here would allow a union to shift the burden of proceeding by doing nothing. If it does nothing long enough it will be absolved of any liability because of its breach of its duty of fair

representation. Finality in the dispute resolution process at the workplace involves all three parties in equal measure. The court should not allow a union to delay an employee's grievance for months and then, as a result of such delay, claim that the employee's action was not timely filed.

Given the fact that the union made representations on two occasions as to actions it would take on petitioner's behalf the scales are definitely tipped to an employee's disadvantage in holding that it is unreasonable to rely on such union representations and that legal action should have commenced.

As was stated by this court, one of the important federal policies underlying § 301 actions is the relatively rapid disposition of labor disputes. *United Parcel Service* vs *Mitchell*, supra, cite at 63, quoting *Auto Workers* vs *Hoosier Cardinal Corp.*, 383 U. S. 696, 707 (1966). This policy is undermined when a union is allowed to take no action on an employee's behalf and the employee's rights are extinguished as a result of such inaction.

III.

UNION INACTION IN PROCESSING A GRIEVANCE CONSTITUTES A CONTINUING VIOLATION OF THE UNION'S DUTY OF FAIR REPRESENTATION WHEN NOT COMMUNICATED TO THE EMPLOYEE

While a union is allowed considerable discretion in deciding which grievances to present and how to present them, it may not ignore an employee's grievance or handle it in a prefunctory manner. *Vaca* vs *Sipes, supra*, 386 U. S. at 191, *Steelworkers* vs *NLRB*, 692 F. 2d 1052 (7th Cir. 1982). Whether a union breaches its duty of fair representation will depend upon the facts of each case. *Griffen* vs *United Automobile Aerospace & Agricultural Implement Workers*, 469 F. 2d 181 (4th Cir. 1972).

There is substantial precedent to consider the union's conduct as a continuing violation of its duty of fair representation. Where impermissable activity on the part of a party can be considered continuing in nature, section 10(b) does not bar legal action even though more than six months have passed. *NLRB* vs *Basic Wire Products, Inc.*, 516 F. 2d 261 (6th Cir. 1975), *NLRB* vs *Albritton Engineering Corp.*, 340 F. 2d 281 (5th Cir. 1965). This continuing violation analysis has specifically been applied to situations where a union has refused to process grievances. *United Rubber Workers* vs *NLRB*, 368 F. 2d 12 (5th Cir. 1966). Since the union has acknowledged the fact that plaintiff's grievance has merit, its conduct in failing to resolve the matter amounts to a continuing violation of its duty of fair representation. The union's inaction on petitioner's grievance (despite its representations to the contrary) is tantamount to ignoring petitioner's grievance. This is precisely the conduct condemned by the court in *Vaca* vs *Sipes, supra.* To allow such inaction to somehow trigger an employee's cause of action, even though such inaction continues, once again shifts the burden of accountability from the union where it belongs, to the unwary and unsophisticated employee. So long as the union's failure to act on an employee's behalf is not communicated to the employee, the breach of the duty of fair representation is continuing in nature.

CONCLUSION

For all these reasons, it is respectfully requested that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 82-2945

SHIRLEY METZ,

Plaintiff-Appellant,

v.

TOOTSIE ROLL INDUSTRIES, INC., and LOCAL UNION NO. 1, BAKERY, CONFECTIONERY AND TOBACCO WORKERS' INTERNATIONAL UNION OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 C 3928—J. Sam Perry, *Judge.*

ARGUED JUNE 3, 1983—DECIDED AUGUST 16, 1983

Before WOOD and CUDAHY, *Circuit Judges,* and CELEBREZZE, *Senior Circuit Judge.**

CUDAHY, *Circuit Judge.* This appeal involves the timeliness of an action brought against an employer both for breach of a collective bargaining agreement and for retaliatory discharge and against a union for breach of its

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* Honorable Anthony J. Celebrezze, Senior Circuit Judge for the Sixth Circuit, is sitting by designation.

duty of fair representation. The district court dismissed the complaint and we affirm.[1]

I.

On June 12, 1980, while employed by Tootsie Roll Industries, Inc. ("TRI"), the appellant, Shirley Metz, was injured at work.[2] Approximately six months later, on January 15, 1981, she was discharged by TRI for failing to return to work. Appellant apparently thought that the discharge was not for just cause and, upon discharge, notified Local Union No. 1, Bakery, Confectionery and Tobacco Workers' International Union of America (the "Union"), of her grievance.

The appellant was a member of the Union and entitled to the benefits of its collective bargaining agreement with TRI. That agreement provided that management was empowered to discharge employees only for cause, that discharge cases were subject to the grievance procedure, and that all grievances had to be filed within five days.[3]

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[1] Appellant's motion to supplement the record on appeal is also hereby granted.

[2] For purposes of this appeal, the facts alleged by the appellant in her complaint are assumed to be true. *See* 5 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1368 (1969).

[3] The collective bargaining agreement provided, in relevant part:

> ARTICLE 7
> Stewards—Grievances—Arbitra[illegible]s
>
> • • •
>
> Section 2. In the event a grievance or dispute arises at any time over wages, hours or working conditions, the Steward upon proper notification to their immediate Department Foreman, shall be given permission to settle, and/or observe grievances. . . . All grievances must be filed within five (5) days.
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> • • •

(Footnote continued on following page)

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[3] *continued*

In the event the dispute or grievance has not been satisfactorily settled within three (3) working days, the Director of Human Resources or his designated representative shall give his answer in writing within five (5) days thereto, to both the employee and his Shop Steward, or the employee and the Business Representative, as the case may be.

Section 3. In the event the dispute or grievance has not been satisfactorily settled between the above parties, it shall, within five (5) days, be presented in writing to the President of Local Union No. 1, Bakery, Confectionery and Tobacco Workers International union, AFL-CIO-CLC, or his designated representative, and the Vice-President in Charge of Manufacturing Operations, and the International Representative of the BC&T, AFL-CIO-CLC in attendance.

Within five (5) days thereafter, a meeting between the President of Local No. 1, BC&T, AFL-CIO-CLC, or his designated representative and the Business Representative of the Union who services the employees who presented the grievance, and the Director of Human Resources and the Director of Labor Management Relations of the Company, or his designated representative and the aforesaid Production Manager, Director of Engineering, or Warehouse Manager, as the case may be, or his designated representative, shall be held in an attempt to settle the grievance.

(a) If a satisfactory settlement cannot be obtained, the matter will be left to arbitration. No individual employee or member shall have the right to invoke arbitration without written consent of the Union. If such written consent is refused, the employee shall have no further recourse to the Company or the Union.

* * *

ARTICLE 8
Discharge

* * *

Section 2. If the Union finds after investigation that the employee has been discharged or laid off without cause, and that it cannot reach an adjustment after exhausting the grievance procedure, it may refer the case to the Arbitration Board for decision.

The Union failed to take action to initiate the grievance procedure. The only action it apparently took in the matter was to write a letter to TRI on May 5, 1981, stating that the appellant's discharge was in violation of the collective bargaining agreement. Although Metz alleged that she repeatedly complained, the Union failed to process her grievance. The Union has not taken any further action from May 5, 1981, to the present.

Metz filed this suit against TRI and the Union, the defendants-appellees, on June 23, 1982, in the district court for the Northern District of Illinois. The complaint alleged both federal and state law claims. The state law claim was cognizable only under the district court's pendent jurisdiction. The federal law claims include both a claim against the Union for breach of its duty of fair representation and a claim against TRI for breach of the collective bargaining agreement under § 301 of the Labor Management Relations Act, 29 U.S.C. § 195. The state law claim is based upon the allegedly retaliatory discharge of the appellant by TRI for filing a workmen's compensation claim under the Illinois Workmen's Compensation Act.

The appellees filed motions to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and argued that the federal law claims were barred by the applicable statute of limitations. TRI gave two reasons for dismissal of the state law action. The first was a lack of pendent jurisdiction given the dismissal of the federal action. The second was based on documents attached to the motion to dismiss which indicated that the appellant did not file a claim for workmen's compensation until *after* she was discharged.

The district court dismissed the entire complaint with prejudice for "reasons set forth in the defendants'[-appellees'] memoranda." Plaintiff-appellant's motion to the district court to reconsider and clarify was denied and this appeal ensued.

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II. *The Federal Law Claims*

A. *Applicable Statute of Limitations*

A suit by an employee against a union for breach of the duty of fair representation and an action against an employer under § 301 of the Labor Management Relations Act for breach of the collective bargaining agreement are inextricably interdependent. "To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union." *Hines v. Anchor Motor Freight*, 424 U.S. 554, 570-71 (1976). Because these cases are not expressly governed by any federal statute of limitations, the appropriate statute of limitations to apply to this section 301/fair representation claim has been the subject of dispute.[4] The Supreme Court, however, in *DelCostello v. Inter-*

[4] Until *DelCostello v. International Brotherhood of Teamsters*, 51 U.S.L.W. 4693, 4697 (1983), federal courts generally applied state statutes of limitations to these federal claims. *See United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 (1981). In *Mitchell*, the Court was presented with the problem of determining the appropriate state statute of limitations to apply to an employee's action against his employer under § 301. *Id.* at 58. The Court determined that the employee's suit was "... more analogous to an action to vacate an arbitration award than to a straight contract action." *Id.* at 62. Therefore, the Court held that the most appropriate state statute of limitations to apply was that used in actions to vacate arbitration awards. *Id.* at 64. In Illinois, a 90-day statute of limitations applies to this type of case. ILL. REV. STAT. (1981), ch. 10, Section 112(b).

The employee's claim against the *union* was not addressed by the *Mitchell* case, however, because only the employer sought *certiorari*. *Id.* at 60. Claims of this sort against unions have been given a treatment somewhat different than *Mitchell* by the lower federal courts. Thus, the Seventh Circuit has stated that:

> This Circuit, other federal Circuits, and the National Labor Relations Board have all held that breach by a labor union of its statutory duty of fairly representing members is an unfair labor practice under the National Labor Relations Act.

(Footnote continued on following page)

national Brotherhood of Teamsters, 51 U.S.L.W. 4693, 4697 (1983), has recently clarified the appropriate treatment of this issue. *DelCostello* involved a suit arising out of a discharge by the terminated employee against the employer and the union.[5] The employee alleged that his discharge was in violation of the collective bargaining agreement and that the union had not represented him fairly in the grievance procedure. *Id.* at 4694. The district court applied Maryland's 30-day statute of limitations for actions to vacate arbitration awards to both the claim against the employer and the claim against the Union. *Id.* With respect to the appropriate statute of limitations to apply in these actions, the Supreme Court said:

> In *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), we held that a similar suit was governed by a state statute of limitations for vacation of an arbitration award, rather than by a state statute for an action

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[4] *continued*

Hall v. Printing and Graphic Arts Union, Local No. 3, 696 F.2d 494, 498 (7th Cir. 1982). Therefore, this court applied to fair representation claims the limitation period for unfair labor practice complaints before the National Labor Relations Board. *Id.* The applicable statute states in pertinent part:

> *Provided* . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . .

§ 10(b) National Labor Relations Act, 29 U.S.C. § 160(b).

[5] The Court decided *United Steelworkers of America, AFL-CIO-CLC v. Flowers*, with *DelCostello* due to the similarity of issues. *Flowers* also involved a suit against an employer for breach of the collective bargaining agreement and against a union for breach of the duty of fair representation. The Second Circuit applied New York's 90-day statute of limitations for vacation of arbitration awards to the claim against the employer. It then applied New York's three-year statute of limitations for malpractice actions to the claim against the union. The Supreme Court reversed with respect to both claims.

> on a contract. We left two points open, however. First, our holding was limited to the employee's claim against the employer; we did not address what state statute should govern the claim against the union Second, we expressly limited our consideration to a choice between two *state* statutes of limitations, we did not address the contention that we should instead borrow a *federal* statute of limitations, namely, § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). These cases present these two issues. We conclude that § 10(b) should be the applicable statute of limitations governing the suit, both against the employer and against the union.

DelCostello, 51 U.S.L.W. at 4694 (emphasis in original) (footnotes omitted). Therefore, the statute of limitations to be applied in the case before us is the six month statute of limitations provided by section 10(b) of the National Labor Relations Act.[6] *See Storck v. International Brotherhood of Teamsters*, Nos. 82-1925, 82-1926 (7th Cir. July 25, 1983).

B. *Is This Action Barred By The Statute of Limitations?*

The appellant contends that the statute of limitations does not bar her § 301/fair representation claim. Appellant's first argument in support of this contention is

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[6] Appellant also argues that the allegation of a cause of action based upon state law requires application of the five year statute of limitations period which Illinois law provides for the state law claim to all claims in the case. This contention has no merit. Appellant forgets that the complaint alleged two independent claims. One claim was a federal law claim which was a hybrid § 301/fair representation claim. As discussed above, the section 10(b) limitation period applies to this claim. The other claim was a pendent state law claim. The reliance upon the state statute of limitations for this second claim does not affect the appropriate statute of limitations to be applied to the federal claim.

that the statutory period still has not begun to run because no "final determination" has been made of her grievance.[7]

In *Hall v. Printing and Graphic Arts Union, Local No. 3*, 696 F.2d 494 (7th Cir. 1982), the plaintiff informed the union of her discharge and the union initiated discussions with the employer. The union refused to take the grievance to arbitration and notified the plaintiff that it would pursue her grievance no further. *Id.* at 496. In discussing the union's refusal to take the grievance to arbitration in connection with the issue of the appropriate statute of limitations to be applied to the employee's claim against the employer, we said:

> Nothing in the language of the collective bargaining agreement convinces us that decisions by the Local not to pursue an employee's grievance all the way to arbitration are any less final or reliable than arbitration awards.

Id. at 497.

In the case before us, the appellant has alleged that under the collective bargaining agreement all cases of discharge are subject to the grievance procedure, that all grievances must be filed within five days and that the Union failed to initiate the grievance procedure. We believe, therefore, that under the language of the collective bargaining agreement, the failure and refusal of the Union to file the grievance within the specified time amounted to a final decision. This case, therefore, falls within the quoted language of *Hall* in that, under the collective bargaining agreement, the failure to file the grievance had the same finality effect as an arbitration award.

---

[7] Appellant's contention that the statute has not yet begun to run raises the interesting issue whether any cause of action has yet accrued to the appellant. That is, the point at which the cause of action would normally accrue is the same point at which a statute of limitations would begin to run. We need not address this argument, however, due to our resolution of the case.

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In *Bigbie v. Local 142, International Brotherhood of Teamsters*, 530 F. Supp. 402, 404 (N.D. Ill. 1981), the plaintiffs requested that the union file a grievance on their behalf, but the union refused. The plaintiffs sought to have a different statute of limitations applied than that for vacation of an arbitration award because there had been no final and binding decision arising from an adjudication. *Id.* at 405. The court, in rejecting the plaintiffs' contention stated:

> From the employee's viewpoint a union's refusal to launch the grievance procedure is just as "final and binding" as a refusal to carry forward a grievance at any point after the procedure has been invoked.

Id. From the viewpoint of the plaintiff in the case at hand, therefore, the alleged "refusal and failure" of the Union to act amounted to a final determination.

The appellant next argues that, even if the Union's alleged failure and refusal to take any further action did give rise to a cause of action, the statute still has not begun to run because neither defendant has informed her about the outcome of her request for the filing of a grievance. Both parties note the general rule that the limitations period begins to run "... when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation]." *Hungerford v. United States*, 307 F.2d 99, 102 (9th Cir. 1962); *see also N.L.R.B. v. Dan Burgess Construction Corp.*, 596 F.2d 378, 382 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979). This case falls within the "should have discovered" prong of the *Hungerford* rule. At some point prior to six months preceding the time this action was brought, the appellant, in the exercise of reasonable diligence, should have discovered the acts constituting the alleged violation.

The violation alleged against the Union was a breach of its duty of fair representation by its failure and refusal to take any action on behalf of the appellant. This inactivity on the part of the union should have been discovered by the appellant prior to the six-month period preceding the initiation of this action. The appellant was discharged on January 15, 1981. Upon her discharge she notified the un-

ion, but the union failed to file a grievance within the five-day limitation under the collective bargaining agreement. The appellant has not alleged that she was misled by the Union as to its activities. As TRI points out, once a grievance has been filed within the required five day period, the contract requires it to be processed through various stages, up to arbitration, until a final decision is reached, which would bind the employee. The contractual provisions call for these proceedings to be exhausted, if the Union does not take the matter to arbitration, in approximately 23 days. Appellant knew, or at least should have known, that under the provisions of the contract the time to elect arbitration had arrived in late February or early March, 1981.

The appellant also alleges that she repeatedly requested the Union to process her grievance and the Union "failed and refused." It is uncontested that from May 5, 1981, until the present, the Union took no action at all. Since this action was brought on June 23, 1982, almost seven months of Union inactivity preceded the six month statutory period. At some point prior to the six month statutory period, the appellant should have realized that the Union was taking no action on her behalf. The appellant cannot be allowed to sit back and claim a lack of notice in light of circumstances such as these. Since the alleged violation, which consisted of Union inactivity, should have been discovered by a reasonably diligent claimant prior to the statutory period, the *Hungerford* test is satisfied.

This result is consistent with the strong federal policy favoring the prompt resolution of labor disputes. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 63 (1981).

> To choose a limitations rule in this case is to strike a balance between the right of an ex-employee to seek legal redress for an unlawful discharge from employment and the rights of an employer to be free of the risk of forever having to make salary payments to discharged employees and of the public to be free of the disruptive effects of lingering instability in labor relations.

Hall, 696 F.2d at 497.

We recognize, of course, that the Union should be encouraged to promptly notify the employee of its decision to pursue, or not to pursue, his or her claim and that this prompt action will help preserve any legal remedies available to the employee. To say, however, that the running of the statute of limitations will be postponed indefinitely until actual notification is received from the Union or the employer, would be contrary to the policy of prompt resolution. Lack of notification would leave claims unresolved indefinitely and leave the procedure open to all of the vices which statutes of limitations were intended to eliminate.

The appellant's final contention is that the Union's conduct constituted a continuing violation of its duty of fair representation. In *Local Lodge No. 1424, International Association of Machinists v. N.L.R.B.*, 362 U.S. 411 (1960) ("*Bryan Manufacturing*"), the Court set out the basic principles to be followed in applying the section 10(b) limitation period in light of the continuing violation doctrine.

In *Bryan Manufacturing*, the General Counsel's complaints alleged that the execution of the collective bargaining agreement involved an unfair labor practice and, consequently, that the continuing enforcement of that agreement was illegal. *Id.* at 414. The execution of the agreement occurred more than six months prior to the filing and serving of the complaints. *Id.* But the Board contended that the execution and the enforcement of the bargaining agreement constituted independent unfair labor practices. *Id.* at 415. Even though the Board conceded that the statute of limitations (§ 10(b)) barred any complaint based upon the execution of the agreement, it contended that evidence as to the execution was admissible and relevant to determining whether conduct within the limitation period was unlawful. *Id.*

The Court, in *Bryan Manufacturing*, held that the General Counsel's complaints were time-barred. *Id.* The Court rejected the Board's contention about the significance of the earlier events by distinguishing two alternative situations:

> The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally dufunct unfair labor practice.

Id. at 416-17 (footnote omitted). The Court stated that the General Counsel's complaints fell in the second category. *Id.* at 417. The Court then went on to say:

> The applicability of these principles cannot be avoided here by invoking the doctrine of continuing violation. It may be conceded that the continued enforcement, as well as the execution, of this collective bargaining agreement constitutes an unfair labor practice, and that these are two logically separate violations, independent in the sense that they can be described in discrete terms. Nevertheless, the vice in the enforcement of this agreement is manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validly executed but unlawfully administered .... In any real sense, then, the complaints in this case are "based upon" the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing *violation* solely by reason of circumstances existing only at the date of execution.

Id. at 422-23 (emphasis in original).

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Thus the outcome in *Bryan Manufacturing* and the discussion in that case of the doctrine of continuing violation in the § 10(b) context indicate that the appellant's reliance upon this doctrine is misplaced. In her complaint, the appellant alleges "[t]hat the defendant Union failed and refused to take any further action on the Plaintiff's discharge from May 5, 1981 to the present." In her brief on appeal, the appellant states: "Since the union has acknowledged the fact that plaintiff's grievance has merit (R. 5, 127), its conduct in failing to resolve the matter amounts to a continuing violation of its duty of fair representation."

Since nothing other than union inactivity is alleged to have occurred since May 5, 1981, which is more than six months prior to the time this action was brought, the principles set out in *Bryan Manufacturing* bar the bringing of this action. That is, even if it is conceded that the Union's inactivity constituted a continuing unfair labor practice, it is only an unfair labor practice by reason of circumstances existing at or before May 5, 1981. The Union's inactivity in the instant case, like the enforcement of the bargaining agreement in *Bryan Manufacturing*, is, absent its earlier dereliction, lawful conduct. If this court were to permit the cloaking of this inactivity with illegality by invoking events which occurred more than six months prior to the bringing of this action, it would in effect be reviving a legally non-cognizable unfair labor practice.

Appellant cites *J. Ray McDermott and Co., Inc. v. N.L.R.B.*, 571 F.2d 850 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978) and *N.L.R.B. v. Basic Wire Products, Inc.*, 516 F.2d 261 (6th Cir. 1975), for the proposition that one need only file a complaint within six months of any one refusal "to perform certain functions." These cases, however, are not apposite here.

Both *McDermott* and *Basic Wire* involve the refusals of employers to bargain with unions. *J. Ray McDermott and Co., Inc.*, 571 F.2d at 858; *Basic Wire Products, Inc.*, 516

F.2d at 262. In each case, there was a specific instance within the six months prior to the time the action was brought in which the employer was actually approached and it refused to bargain. *J. Ray McDermott and Co., Inc.*, 571 F.2d at 858; *Basic Wire Products, Inc.*, 516 F.2d at 263. In each case, the court stated that the employer was under a duty to bargain and that each refusal, in and of itself, was a violation of that duty. *J. Ray McDermott and Co., Inc.*, 571 F.2d at 858; *Basic Wire Products, Inc.*, 516 F.2d at 268. In each case, the court required that the complaint be filed within six months of one such refusal.

McDermott and *Basic Wire* are inapplicable to the instant case for two reasons. First, in the case before us, there is no specific instance of refusal alleged to have occurred within the six months preceding the filing of this complaint. Only union inactivity is alleged. Second, in both *McDermott* and *Basic Wire*, the courts brought the cases within *Bryan Manufacturing* by finding that the specific refusal to bargain when the employer was under a duty to bargain was, in and of itself, an unfair labor practice. The court in *McDermott* stated:

> Our reasoning is not controlled by a conclusory labeling of the employer's duty or of his violation as a "continuing" one. Rather, we recognize that the primary purpose of the six-month rule is to assure prompt adjudications of disputes based on fresh evidence. McDermott's refusal to bargain was based on motives contemporaneous with its refusal to bargain on April 21, 1976. The filing of the complaint on April 29, 1976 brought those motives into question, and was timely with regard to the unfair labor charge alleged.

J. Ray McDermott and Co., Inc., 571 F.2d at 858. In the case before us, it cannot be said that the Union's inactivity, in and of itself, constituted an unfair labor practice. It is similar to the enforcement problem in *Bryan Manufacturing*. Only by reference to other events can the vice in the inactivity be found. Since no other events are alleged to have occurred within the six months prior to this action, only events before that period could cloak the conduct with illegality.

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We therefore find that the appellant's federal action against the Union and, consequently, her action against the employer are time-barred, and that the appellant's section 301/fair representation claims were properly dismissed.

III. *The State Law Claim*

The second count of appellant's complaint alleges that TRI discharged her in retaliation for filing a workmen's compensation claim against TRI. Since this was a claim based upon Illinois law, the jurisdiction of the federal court could only have been pendent.

As discussed above, the federal claim, to which the state law claim was attached, was properly dismissed. Therefore, the district court properly exercised its discretion in dismissing the state law claim as well. As the Court stated in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966):

> It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants . . . Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

383 U.S. at 726 (footnotes omitted). To dismiss the state law claim with prejudice, however, required more than the pretrial dismissal of the federal claim. *Id.* at 726-27; 13 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3567 at p. 451 (1975 and 1981 Supplement). The district court based its judgment upon the reasons set forth in the defendant-appellee's memorandum in support of its motion to dismiss. Because one of TRI's two reasons for dismissal of the state law claim was simply dismissal of the federal claim, the district court must have relied upon the second reason given by TRI to dismiss with prejudice.

TRI's second argument was based upon certain documents[8] attached to its motion to dismiss.[9] These documents show that the appellant's claim for workmen's compensation was filed on January 19, 1981, and that TRI received the form of Notice to Employer on or about January 26, 1981. Since the appellant alleged that she was discharged on January 15, 1981, or four days before she filed for workmen's compensation, TRI contends that the discharge could not have been in retaliation for filing the claim. In light of the documents produced by TRI and the failure of the appellant to adequately controvert TRI's evidence, this contention is dispositive.[10]

---

[8] These documents consisted of the following: An affidavit of the Director of Human Resources of TRI; A copy of an Application For Adjustment of Claim for Workmen's Compensation filed by the appellant with the Illinois Industrial Commission; A form of Notice to Employer of the filing of the appellant's claim with the Commission.

[9] Because documents outside the pleadings were provided to the court, the motion is properly considered one for summary judgment. *See* FED. R. CIV. P. 12(b).

[10] The appellant stated at oral argument that she had been receiving, prior to filing a compensation claim, some unspecified benefits from TRI because of her injury. TRI stated at oral argument that it was routine company policy to make payments to injured employees.

The appellant cites no authority and makes no argument as to why this additional fact should make a difference. Since the payment of this money was a matter of company policy and not obtained as a result of filing a claim for workmen's compensation under the Illinois Workmen's Compensation Act, it seems irrelevant to the appellant's claim as set out in the complaint.

We also note that since the district court decided this case, this court, in *Lamb v. Briggs Manufacturing, a Division of Celotex Corp.*, 700 F.2d 1092, 1093 (7th Cir. 1983), has held that Illinois law does not provide a tort cause of action for retaliatory discharge to an employee who is party to a collective bargaining agreement which only allows discharge for just cause. The appellant, in the instant case, alleged in her complaint that she was party to such an agreement (R. 2-3). Therefore, even if the contention of TRI, on which the district court based its judgment, was rejected, appellant's state law claim might still have to be dismissed with prejudice.

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The district court's decision to dismiss both claims of the appellant is therefore

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 30224—Midwest Law Printing Co., Inc., Chicago—8-16-83—400

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June 7, 1982

Donald E. Puchalski, Esq.
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Re: Shirley Metz & Tootsie Roll Industries, Inc.

Dear Mr. Puchalski:

I'm sorry about the delay in responding to you. The delay was occasioned by the move of our office and the fact that Mr. Hill was out of town. I have consulted with Mr. Hill. He informs me that he has repeatedly attempted to arrange a meeting between the Union, Tootsie Roll management and Ms. Metz. Ms. Metz has not positively responded to his attempts to arrange such a meeting. However, Mr. Hill advises me that such a meeting is still available and that he had been attempting to remind Ms. Metz to arrange for her participation. In any event, if Ms. Metz will please contact Mr. Hill, he will proceed with arrangements for the meeting. I would trust that following the meeting any outstanding issues in connection with Ms. Metz's employment can be resolved.

Very truly yours,

CORNFIELD AND FELDMAN

Gilbert A. Cornfield

GAC/saf

cc: Maxie D. Hill

Supreme Court, U.S.
FILED
DEC 15 1983
ALEXANDER L. STEVAS
CLERK

No. 83-819

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SHIRLEY METZ,

Petitioner,

vs.

TOOTSIE ROLL INDUSTRIES, INC., and LOCAL UNION NO. 1, BAKERY, CONFECTIONERY AND TOBACCO WORKERS' INTERNATIONAL UNION OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF TOOTSIE ROLL INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

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ADDITIONAL QUESTION PRESENTED FOR REVIEW

(1) Did the union's failure and refusal to file and process the employee's grievance within the time requirements of the collective bargaining agreement start the running of the statute of limitations.

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BRIEF OF TOOTSIE ROLL INDUSTRIES, INC.* IN OPPOSITION TO PETITION FOR CERTIORARI

The respondent, Tootsie Roll Industries, Inc., respectfully prays that the Petition for Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 16, 1983 be denied.

---

* Tootsie Roll Industries, Inc. has no parent corporation and has no subsidiaries other than those wholly owned by it, and no affiliates.

ADDITIONAL STATEMENT OF THE CASE

The Petition of Plaintiff filed with this Court for Certiorari to the Seventh Circuit Court of Appeals omits reference in its Statement of the Case to certain facts which are essential to any review of the decision of the Court of Appeals.

Plaintiff, Shirley Metz, was discharged from employment by Tootsie Roll Industries, Inc. (TRI) on January 15, 1981. In her Complaint, Plaintiff made the following allegations with respect to her discharge:

> (a) Upon her discharge, Plaintiff notified the Union of her discharge and requested that the Union initiate a grievance on her behalf; (paragraph 18) (R. 4)
>
> (b) Under the collective bargaining agreement between TRI and the Union, all grievances must be filed within five (5) days; (paragraph 10) (R. 4)
>
> (c) Despite her request, the Union failed to initiate the grievance procedure and thereafter in bad faith and in an arbitrary and discriminating manner refused to process the grievance or to take any affirmative action on her behalf; (paragraph 19) (R. 4)
>
> (d) The Union failed and refused to take any further action on the Plaintiff's discharge from May 5, 1981 to the present, ie. until the time of filing her Complaint—June 23, 1982. (paragraph 23) (R. 5)

The provisions contained in the collective bargaining agreement (the "Bargaining Agreement") between TRI and the Union relating to grievance procedures are quoted in Note 3 to the Opinion of the Court of Appeals below. These grievance procedures require the filing of the grievance within five (5) days. The grievance is then processed through several stages of negotiation, each one having a time limitation for completion. The procedure culminates in approximately twenty-three (23) days with a decision to be made exclusively by the Union as to whether there shall be arbitration.

SUMMARY OF ARGUMENT

1. The petition fails to assert grounds set forth in Supreme Court Rule 17 for issuance of a Writ of Certiorari.

2. The statute of limitations in Section 10(b) of the NLRA bars the action.

3. The alleged failure of fair representation by the union was not a continuing violation extending the time for the running of the statute of limitations.

REASONS FOR DENIAL OF WRIT

I.

THE PETITION FAILS TO SHOW A REASON FOR REVIEW CONFORMING TO THE STANDARDS OF SUPREME COURT RULE 17

Plaintiff's Petition has not urged any of the special or important reasons for granting the Writ in this case as described in the Supreme Court Rule 17. In fact, none is present in the case. There is no claim of conflict between decisions of Federal Courts of Appeal in the same matter. Nor is there any showing of conflict with an applicable decision of this Court. No important question of Federal law is presented.

The sole issue in the case concerns whether Plaintiff's claimed cause of action was barred by the applicable Statute of Limitations under the specific factual circumstances which are involved. Plaintiff simply argues that the Seventh Circuit Court of Appeals erred in its decision as to when a cause of action accrued to the Plaintiff. The circumstances are most unlikely to again be presented for judicial review. Employee grievances are commonly disposed of with dispatch, and it is not to be expected that an employee who requests his union to process a grievance would in any other case conclude that the grievance is still undecided more than a year later. There being no special reason shown for the exercise by this Court of its discretion in granting a review of this case, it is submitted that the Petition should be denied.

II

THE STATUTE OF LIMITATIONS BARS PLAINTIFF'S CLAIMS

Plaintiff concedes that this Court's decision in *Del Costello* v. *International Brotherhood of Teamsters*, ____ U.S. ____, 76 L.Ed.2d 476, 103 S.Ct. 2281 (June, 1983) requires the application of the six months limitation period provided by Section 10(b) of the National Labor Relations Act (29 U.S.C. 160(b)) to Plaintiff's cause of action. This leaves Plaintiff's argument resting upon the very narrow and limited claim that in her case the statute never commenced to run and no cause of action ever accrued because she was never formally advised that her grievance had not been filed or processed by the Union. Plaintiff waited one year and five months after her discharge before she filed the suit.

Plaintiff's contention requires her to ignore the specific allegations made in her Complaint and the plain language of the Bargaining Agreement dealing with grievances. Plaintiff claims in her Petition to this Court that the Union never informed her that it would not file or process her grievance and that some formal notice from the Union was required before the limitations period could commence to run.

The Seventh Circuit correctly found the fallacy in this position. Plaintiff as a Union member, knew, or at least should have known, that the Bargaining Agreement required the filing of her grievance in five days and the making of a final decision before arbitration in about 23 days. Plaintiff does not claim that she did anything to find out about the status of her grievance at any time. She simply waited for over a year for someone to give her information which she could have easily obtained by an inquiry to the Union at some time along the line. In the exercise of reasonable deligence Plaintiff should have known very early in the proceedings that her grievance had not been filed. *Hungerford* v. *United States* 307 F. 2d 102 (10th Cir. 1962).

At Page 8 of her Petition, Plaintiff refers to a letter dated May 5, 1981 written by the Union to TRI requesting reinstatement of Plaintiff's employment. If anything that letter should have caused Plaintiff to inquire of the Union as to the status of her grievance. Yet all she says in her Complaint is that "the Union failed and refused to take any further action on Plaintiff's discharge from May 5, 1981 to the present". Plaintiff still waited more than a year after the date of the letter to file suit.

It is submitted that Plaintiff's own lack of diligence was the sole cause of her delay in filing the suit.

III

THE UNION'S INACTIVITY DID NOT CONSTITUTE MULTIPLE VIOLATIONS OF THE UNION'S DUTY OF FAIR REPRESENTATION

Commencing on Page 9 of the Petition, Plaintiff argues that in this case the Union was guilty of a continuing violation of its duty to Plaintiff resulting in multiple causes of action each having its own separate statutory limitations. The Court of Appeals gave full consideration to this argument and properly rejected it. Plaintiff makes no attempt to respond to the painstaking discussion by the Court of Appeals of the case of *Local Lodge No. 1424, International Association of Machinists* v. *NLRB ("Bryan Manufacturing")* 362 U.S. 411, 4 L.Ed.2d 832, 80 S.Ct. 822 (1960) wherein the same contention was overruled.

The cases of *NLRB* v. *Basic Wire Products, Inc.*, 516 F.2d 261 (6th Cir. 1975), *NLRB* v. *Albritton Engineering Corp.*, 340 F.2d 281 (5th Cir. 1965) and *United Rubber Workers* v. *NLRB*, 368 F.2d 12 (5th Cir. 1966) cited by Plaintiff all involved repeated action on the part of defendants, each repetition of which was a new cause of action. Here Plaintiff has alleged only one submission of a grievance. That one occasion took place more than a year before the suit was filed. There was no further demand made by Plaintiff on the Union thereafter.

In the case of *NLRB* v. *Auto Warehousers, Inc.*, 571 F.2d 860 (5th Cir. 1978) the Court said, at page 865: "Independent violations of continuing obligations do not exist where the illegality of the conduct charged cannot be established without assessing events outside the 10(b) period." In this case, the Union's inactivity, in and of itself, did not constitute an unfair labor practice. Only by reference to the events which took place more than 6 months prior to the filing of the Complaint, i.e., the discharge of the Plaintiff by TRI and the Union's failure and refusal to file or process a grievance on the Plaintiff's behalf, could the Union's conduct be determined to be illegal. Accordingly, the Plaintiff's federal action against the Union and, consequently, her action against TRI were time-barred under the authority of *Bryan Manufacturing*, supra.

CONCLUSION

It is submitted that for the reasons set forth above, the Petition for a Writ of Certiorari to review the judgment and opinion of the Seventh Circuit Court of Appeals should be denied.

Respectfully submitted,

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No. 83-819

IN THE

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OCTOBER TERM, 1983

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 83-819

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SHIRLEY METZ,

Petitioner,

VS.

TOOTSIE ROLL INDUSTRIES, INC. and LOCAL UNION NO. 1, BAKERY, CONFECTIONERY AND TOBACCO WORKERS' INTERNATIONAL UNION OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

Petitioner filed her complaint in District Court against Tootsie Roll Industries, Inc. ("TRI") and Local Union No. 1, Bakery, Confectionery and Tobacco Workers' International Union of America ("Union") on June 23, 1982. In Count I, brought under Section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185, Petitioner alleged that she was terminated by TRI in violation of the collective bargaining agreement in effect between TRI and the Union, and that the Union breached its statutory duty of fair representation. In Count II of the complaint, brought solely against TRI, Petitioner alleged that

she was discharged in retaliation for seeking enforcement of statutory rights under the Workers Compensation Act, Ill.Rev.Stat., 1981, Ch. 48, Section 138.1, *et seq.*

Petitioner, in Count I of the complaint, made the following allegations:

(1) Petitioner was discharged by TRI on January 15, 1981.

(2) Petitioner denies that her discharge was for just cause under the collective bargaining agreement.

(3) Upon her discharge, Petitioner notified the Union of her grievance and requested that it enforce her rights under the collective bargaining agreement.

(4) The Union failed to initiate the grievance procedure and, thereafter, failed to process the grievance or to take any other affirmative action on Petitioner's behalf.

(5) The collective bargaining agreement between the Union and Employer provides that "all grievances must be filed within five days."

(6) On May 5, 1981, the Union, in a letter written to TRI, stated that it was the Union's position that TRI's action had violated Petitioner's rights under the collective bargaining agreement.

(7) Despite Petitioner's requests that the Union process her grievance, the Union failed and refused to process a grievance on Petitioner's behalf or to take any further action on Petitioner's discharge from May 5, 1981 to the time of the filing of her complaint on June 23, 1982.

Both TRI and the Union filed Motions to Dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The District Court dismissed the fair representation claim, Count I, on the basis that it was barred by the applicable statute of limitations.

On appeal to the Seventh Circuit Court of Appeals, Petitioner filed a Motion To Supplement The Record On Appeal with a letter dated June 7, 1982 (a copy of which appears in the Appendix, at 18a, to the Petition For Writ of Certiorari). Such Motion was granted by the Court of Appeals. 715 F.2d 299, 300, n.1. The letter is dated just over two weeks prior to the filing of the complaint, is addressed to the Petitioner's attorneys from the Union's attorneys, and is a response to an earlier communication from Petitioner's attorneys. The letter states that the Union has repeatedly attempted to set up a meeting among the Union, TRI and Petitioner; that Petitioner has failed to respond to such attempts; and that such a meeting is still available.

The Court of Appeals, relying on *DelCostello* v. *International Brotherhood of Teamsters*, — U.S. —, 103 S.Ct. 2281, 2290 (1983), (715 F.2d at 302, 303, 306), affirmed the District Court's dismissal of the Section 301 fair representation claim on the grounds that such claim was barred by the applicable statute of limitations, the six month statute of limitations provided by Section 10(b) of the National Labor Relations Act, 29 U.S.C. Section 160(b).

REASONS FOR DENIAL OF CERTIORARI

I. The Court of Appeals Correctly Determined That A Union's Failure And Refusal To Initiate The Grievance Procedure Is A Final Determination For Purposes Of The Running Of The Statute Of Limitations.

In *DelCostello* v. *International Brotherhood of Teamsters*, — U.S. —, 103 S.Ct. 2281, 2290, this Court held that the six month statute of limitations provided by Section 10(b) of the National Labor Relations Act, 29 U.S.C. Section 160(b), is the applicable statute of limitations governing employee actions under Section 301 against both employers

and unions, where it is alleged that the employer violated a collective bargaining agreement and the union breached its duty of fair representation. The Court of Appeals, therefore, correctly held that the six month statute enunciated in *DelCostello* governs the present case. 715 F.2d at 303.

The Court of Appeals, further, correctly concluded that Petitioner's claim was barred by the six month statute of limitations. In reaching such conclusion, the Court of Appeals properly rejected Petitioner's contention that "[s]ince no final determination has been made with regard to this grievance, the six-month limitations period has not yet commenced." Petition, at 8. As recognized by the Court of Appeals, "Appellant's contention that the statute has not yet begun to run raises the interesting issue whether any cause of action has yet accrued to the appellant. That is, the point at which the cause of action would normally accrue is the same point at which a statute of limitations would begin to run." 715 F.2d at 303, n.7.

Contrary to Petitioner's suggestions, this case simply does not raise the issues of what action on a union's part triggers the running of the statute of limitations or when an employee should be aware that a breach has been committed. Rather, the facts of this case make it clear that this employee was well aware, over a year prior to the filing of her complaint, of the facts of her discharge, of the contractual grievance provisions, and of the Union's failure to file a grievance pursuant to those provisions.

The Court of Appeals correctly concluded that Petitioner's complaint revealed on its face that it was barred by the six month statute of limitations. As the Court found:

> "... [Petitioner] has alleged that under the collective bargaining agreement all cases of discharge are subject to the grievance procedure, that all grievances must be

> filed within five days and that the Union failed to initiate the grievance procedure. We believe, therefore, that under the language of the collective bargaining agreement, the failure and refusal of the Union to file the grievance within the specified time amounted to a final decision." 715 F.2d at 303.

If, as alleged by Petitioner, the Union failed and refused to file a grievance on her behalf, then Petitioner's discharge from employment became final and binding pursuant to the collectively-bargained for grievance procedure when not grieved by the Union within five (5) days after her discharge, or on January 20, 1981. Petitioner's cause of action against the Union thus began to run at that time.

The Court of Appeals properly rejected Petitioner's suggestion that no statute of limitations period has begun to run against her because she has received no final determination regarding the action taken or not taken on her grievance. This Court, in *United Parcel Service* v. *Mitchell*, 451 U.S. 56 (1981) and *DelCostello*, in selecting relatively short statutes of limitation, focused on the nature of the action—an action for breach of the duty of fair representation—and not on the stage of the grievance-arbitration procedure at which the breach is alleged to have occurred. Thus, in *Mitchell*, this Court said:

> "We think that the unfair representation claim made by an employee against his union, even though his employer may ultimately be called upon to respond in damages for it if he is successful, is more a creature of 'labor law' as it has developed since the enactment of § 301 than it is of general contract law." *Mitchell*, 451 U.S. at 63.

In *DelCostello*, this Court characterized duty-of-fair representation claims as "allegations of unfair, arbitrary, or discriminatory treatment of workers by unions." —— U.S. at ——, 103 S.Ct. at 2293. The *DelCostello* Court quoted with

approval Justice Stewart's observation in a concurring opinion in *Mitchell*:

> "The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective-bargaining agreement unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it.' [*Auto Workers* v. *Hoosier Corp.*, 386 U.S. 696, 702 (1966)] . . . 451 U.S. at 70-71 (opinion concurring in the judgment) (footnote omitted)."

Where a collectively-bargained for grievance procedure requires that all grievances must be filed within five days, a failure or refusal to launch the grievance procedure results in just as final and binding a determination with respect to the employee as does a failure or refusal not to pursue a grievance all the way to arbitration.

Lower federal courts faced with this issue have reached similar conclusions. In *Hall* v. *Printing and Graphic Arts Union, Local No. 3*, 696 F.2d 494 (7th Cir., 1982), the Court rejected a contention that a union's failure to pursue a discharge grievance to arbitration was less final and binding with respect to the employee than is an arbitrator's award:

> "Nothing in the language of the collective bargaining agreement convinces us that decisions by the Local not to pursue an employee's grievance all the way to arbitration are any less final or reliable than arbitration awards." 696 F.2d at 497, footnote omitted.

In *Badon* v. *General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982), decided after *Mitchell* but before *DelCostello*, the plaintiff alleged that the union failed to represent him fairly in the processing of his pension claim against the employer. After the employer denied the pension claim, the

union, under the terms of the collective bargaining agreement, had thirty days in which to file an appeal of the decision. No appeal was filed. The Sixth Circuit concluded that the failure to file an appeal resulted in as final and binding a decision with respect to the employee as would have resulted from arbitration:

> "[W]here an employer's decision has become final through the operation of the collectively bargained-for private system of dispute resolutions, the rule of Mitchell applies and the state statute of limitations pertaining to the vacation of arbitration awards will be utilized in subsequent federal court proceedings." 679 F.2d at 98.

In *Bigbie* v. *Teamsters, Local 142*, 530 F.Supp. 402 (N.D. Ill., 1981), the Court held that a fair representation claim was barred by the 90-day arbitration statute where the union had failed to file a grievance on the plaintiff's behalf. The Court found that, under *Mitchell*:

> "[I]t is quite irrelevant at what point in the contractual grievance procedure the union's breach of its duty of fair representation has occurred. Whether union has failed to file any grievance at all (as alleged here) or has failed to represent the employee fairly before the grievance committee (as in Davidson [v. *Roadway Express, Inc.*, 650 F.2d 902 (7th Cir. 1981)]) or has failed to appeal from an adverse arbitration decision (as in Mitchell) has no significance in relation to the substance of a Section 301 claim: whether Union has breached its duty of fair representation. From the employee's viewpoint a union's refusal to launch the grievance is just as 'final and binding' as a refusal to carry forward a grievance at any point after the procedure has been invoked." 530 F.Supp. at 405.

Other district courts, in cases decided after *Mitchell* but prior to *DelCostello*, have, similarly, held that claims against unions and employers under Section 301 in which

it is alleged that the union failed or refused to file or process a grievance are governed by state statutes for actions to vacate arbitration awards or by the six month limit in Section 10(b) of the NLRA, and that such claims accrue at the time a grievance would have had to have been filed or processed under the applicable collective bargaining agreement. *Russom* v. *Sears, Roebuck & Co.*, 113 LRRM 2353, 2364, 2366 (E.D.Mo. 1982); *Gardner* v. *Illinois Bell Telephone Co.*, —— F.Supp. ——, 112 LRRM 2360, 2362 (C.D. Ill. 1982); *Orange* v. *Safeway Stores, Inc.*, 556 F. Supp. 510 (D.D.C. 1983); *Perez* v. *Dana Corp.*, 545 F.Supp. 950 (E.D.Pa., 1982); *Lewis* v. *Harbison-Walker Refractories*, 542 F.Supp. 1381 (N.D. Ind. 1982); *Brice* v. *McDonnell Douglas Corp.*, —— F.Supp. ——, 111 LRRM 2031 (D.C.Cal. 1982).

In the present case, Petitioner alleges that, although she was discharged on January 15, 1981 and asked the Union to file a grievance on her behalf, the Union failed to initiate the grievance procedure or take any action on her behalf. The grievance procedure provides that grievances must be filed within five days. Five days after discharge, Petitioner's discharge thus became final and binding through the operation of the collectively-bargained for system of dispute resolution. At that time, Petitioner's cause of action accrued. Since Petitioner was aware that the Union had failed to file a grievance despite her requests, this case simply presents no issue as to when the six month limitations period began to run.

II. The Court Of Appeals Correctly Applied The General Rule That A Statute Of Limitations Begins To Run When The Claimant Discovers, Or In The Exercise Of Reasonable Diligence Would Have Discovered, The Acts Constituting The Alleged Violation.

The Court of Appeals correctly rejected Petitioner's contention that no statute of limitations period has yet

begun to run because "petitioner never was informed of the status of her grievance." (Petition at 6.) Under Petitioner's theory, the statute of limitations does not begin to run until she receives some kind of official notification. Were this theory to be carried to its extreme, Petitioner would not be barred from initiating a fair representation action against the Union twenty years hence. Such a theory clearly flies in the face of the federal labor policies reaffirmed by this Court in *United Parcel Service* v. *Mitchell*, 451 U.S. 56, 63 and *DelCostello* v. *International Brotherhood of Teamsters*, ___ U.S. ___, 103 S.Ct. 2281, 2292-93, favoring the rapid and final resolution of labor disputes.

This case does not raise the issue of at what point in time an employee should realize that a union's inaction constitutes a breach of its duty of fair representation because, in this case, it is undisputed that Petitioner knew, over a year prior to filing her complaint, that the Union had failed to grieve her discharge. This is not a case where an employee was misled into thinking a union had filed a grievance when it had not actually done so, nor is it a case where an employee was unaware of the action taken against her by her employer.

The Court of Appeals properly found that the applicable rule was that consistently used by courts and the National Labor Relations Board in applying Section 10(b) of the NLRA to unfair labor practice charges. Such general rule provides that the limitations period begins to run "when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation]." *Hungerford* v. *United States*, 307 F.2d 99, 102 (9th Cir. 1962); see also *N.L.R.B.* v. *Don Burgess Construction Corp.*, 596 F.2d 378, 382 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979). The Court of Appeals applied this general rule correctly in finding that "[t]his case falls

within the 'should have discovered' prong of the *Hungerford* rule. At some point prior to six months preceding the time this action was brought, the appellant, in the exercise of reasonable diligence, should have discovered the acts constituting the alleged violation." 715 F.2d at 304.

An unfair representation action may be based either on alleged wrongful action on a union's part or an alleged wrongful inaction. In the present case, the basis for Petitioner's claim is alleged inaction on the part of the Union. Petitioner's argument that her cause of action does not begin to run until she receives some kind of official notice of the Union's inaction has no support in law. Once the Union stopped acting or failed to act on her grievance, Petitioner "had at that point exhausted to the extent possible the grievance and arbitration procedures established by the collective bargaining agreement and was entitled to institute suit against . . . [her] union or employer under § 301. See *Clayton* v. *International Union, United Automobile Workers*, 451 U.S. 679, 101 S.Ct. 2088, 68 L.Ed. 2d 538 (1981)." *Martin* v. *Pullman Standard*, 538 F.Supp. 1174, 1176 (W.D.Pa. 1982).

Petitioner's complaint revealed on its face that she was, in fact, aware, over a year prior to the filing of her complaint, of the alleged inaction. She alleged that she was discharged on January 15, 1981; that, upon her discharge, she notified the Union; but that the Union failed to file a grievance within the five day time limit under the collective bargaining agreement. As the Court of Appeals found, once a grievance is filed within the required five day period, the contract requires it to be processed through the steps of the grievance procedure within a relatively rapid period of time. Under the contractual provisions, where no arbitration is requested, the grievance procedure would be ex-

hausted in approximately 23 days. 715 F.2d at 300-301, n.3., 302.

Nowhere in the complaint did Petitioner allege that either the Union or the Employer had misled her to believe that a grievance had been filed or was pending when such was not the case. Rather, Petitioner alleged that despite her repeated requests that the Union process her grievance, the Union "failed and refused" to do so. The Court of Appeals correctly found that:

> ". . . It is uncontested that from May 5, 1981, until the present, the Union took no action at all. Since this action was brought on June 23, 1982, almost seven months of union inactivity preceded the six month statutory period. At some point prior to the six month statutory period, the appellant should have realized that the Union was taking no action on her behalf. The appellant cannot be allowed to sit back and claim a lack of notice in light of circumstances such as these. Since the alleged violation, which consisted of union inactivity, should have been discovered by a reasonably diligent claimant prior to the statutory period, the *Hungerford* test is satisfied." 715 F.2d at 304.

Petitioner's argument that the limitations period has not yet begun to run is in no way supported by the fact that the Union wrote a letter to TRI in May, 1981 stating that TRI's action violated Petitioner's rights under the collective bargaining agreement or by the fact that in June, 1982, two weeks prior to the filing of the lawsuit, the Union's attorneys, responding to a communication from Petitioner's attorneys, offered to set up a meeting among the parties. The letter of June, 1982 does not mention any grievance. Rather, it indicates only that the Union was willing to set up a meeting. The Union's action in offering to set up a meeting in June, 1982 did not reopen a statute of limitations that had already run out at least seven months earlier. This

conclusion was reached by a district court recently faced with an argument similar to that made by Petitioner here:

> "Plaintiff's counsel has also suggested that the grievance procedure was somehow revived by informal discussions on plaintiff's grievance initiated by International Representative Ned Davy at the request of plaintiff's counsel in September, 1979. Yet these discussions were held on an informal basis as a courtesy to plaintiff and could not by the terms of the collective bargaining agreement revive a grievance that had long since become final. To permit such informal action to toll the statute of limitations after it has expired would totally violate the statute's effect. Thus a plaintiff would request at anytime even years later reconsideration of a final grievance resolution and a union would lose the protection of the statute merely by agreeing to assist the plaintiff. Nothing in the equitable doctrine of tolling supports such a result." *Hardesty* v. *Essex Group, Inc.*, — F.Supp. —, 133 LRRM 2690, 2696 (N.D. Ind. 1982).

In *Adkins* v. *General Motors Corp.*, — F.Supp. —, 113 LRRM 2147, 2151 (S.D.Ohio, 1983), the Court noted that: "[t]he general rule appears to be that a § 301 action accrues no later than the time Plaintiff 'knew or reasonably should have known that [a breach of the duty of fair representation] had occurred, even if some possibility of nonjudicial enforcement remained.' *Santos* v. *District Council of New York City*, 619 F.2d 963, 969 (2nd Cir. 1980)."

III. The Court Of Appeals Properly Rejected Petitioner's Argument That The Union's Alleged Conduct In Failing To Represent Her Constitutes A Continuing Violation Of The Duty Of Fair Representation.

This case does not raise the issue of whether a breach of the duty of fair representation may constitute a continuing violation. All that occurred in the six months prior to the filing of the complaint was Union inaction, and it is

undisputed that Petitioner had already been aware of the Union's failure to act on her request to file a grievance for at least seven months prior to the limitations period. Moreover, this is not a case where a union's failure to act resulted in new or repeated harm to an employee. When no grievance was filed over Petitioner's discharge, that discharge became final. Nothing more resulted from the Union's continued inaction after that point.

The Court of Appeals correctly found Petitioner's reliance on the continuing violation doctrine to be misplaced. Contrary to Petitioner's assertions, there is no support in court cases applying Section 10(b) of the NLRA for finding a union's failure to file a grievance as constituting a continuing unfair labor practice. Moreover, even in those situations where the continuing violation theory has been found applicable, the courts have required a finding of an independent violation of the continuing obligation in question within the six month period.

As recognized by the Court of Appeals, this Court, in *Local Lodge No. 1424, International Association of Machinists* v. *N.L.R.B.*, 362 U.S. 411 (1960) ("Bryan Manufacturing"), held that a continuing violation theory is not intended to be used to revive unfair labor practices occurring outside of the limitations period. This Court, in *Bryan Manufacturing*, found that, "where occurrences within the six month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices," earlier events may be used to shed light on the events within the six month period. Where, however, "conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice," the otherwise legal action occurring within the limitations period does not revive the "legally defunct unfair labor practice." *Bryan Manufacturing*, 362 U.S. at 416-17; 715 F.2d at 305.

In the present case, nothing but inaction on the Union's part is alleged within the six month period. Even if such conduct constituted a breach of the duty of fair representation, it would constitute such a breach only by reason of events occurring outside the limitations period, i.e. the Petitioner's discharge and the Union's refusal to initiate a grievance.

Moreover, contrary to Petitioner's assertion, the continuing violation analysis has not been found applicable to a union's refusal or failure to process grievances. In *United Rubber Workers* v. *N.L.R.B.*, 368 F.2d 12 (5th Cir. 1966) (Petition at 10), the Court affirmed the Board's finding that an unfair labor practice charge had been timely filed, where the Board had specifically found that the union had, within the six month limitations period, refused instructions from its international union to process the charging employees' grievances. 150 NLRB at 333. Neither the Court nor the Board. in that case, made any finding of a continuing violation.

The Board's continuing violation theory has been applied only in certain circumstances where a party is under some kind of continuing obligation. Moreover, even where such a continuing obligation exists, there must be an independent violation of that obligation within the six month period. Thus, in *N.L.R.B.* v. *Basic Wire Products, Inc.*, 516 F.2d 261 (6th Cir. 1975) (Petition at 10), the Court noted that, because of a Board rule that a union's certification as collective bargaining representative, if based on a Board-conducted election, must be honored for one year, the employer was under a continuing obligation to bargain with the union for one year. Even so, however, a charge based upon a refusal more than six months old would be untimely: "The Union was required under Section 10(b) to bring an unfair labor practice charge within six months of the refusal in question." *Id.* at 268.

In *Albritton Engineering Corp.*, 340 F.2d 281 (5th Cir. 1964), *cert. denied*, 382 U.S. 815 (1965) (Petition at 10), the Court found that, where the employer had told applicants that their original employment applications would be considered continuing applications, the company committed a separate unfair labor practice each time within the 10(b) period that it by-passed such applicants for discriminatory reasons.

In the present case, any breach on the part of the Union would have occurred, if at all, when it failed and refused to file a grievance within five days of Petitioner's discharge. Moreover, no alleged refusal occurred within the six month limitations period. All that is alleged to have occurred within the six month period is inactivity, and such inactivity cannot, without reliance on earlier events, be found to constitute a breach of the duty of fair representation. A finding that mere continued inaction on the part of a union constitutes a continuing violation would mean that an employee could file a fair representation action years after a union's failure or refusal to file a grievance, even though an employee was well aware at the time a grievance should have been filed under that contract that no grievance had been filed. Such a finding would clearly run contrary to the very purpose of the relatively short statute of limitations selected by this Court in *DelCostello*.

CONCLUSION

For the above reasons, the Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

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